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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 462

SIMPSON BROS., INC., A CORPORATION,
Petitioner

v.

DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Petitioner, Simpson Bros., Inc., a corporation, trading as the Wakefield Dairy, asks the issuance of a Writ of Certiorari to review the judgment below affirming a decision of the United States District Court for the District of Columbia, which granted a summary judgment herein to the defendant, The District of Columbia, a Municipal Corporation.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254, 2101. The decision below was rendered September 6, 1949 (R. 50).

STATUTES INVOLVED

The Price Control Extension Act of July 25, 1946, 60 Stat. 664, is as follows:

Sec. 1A:

(b) Declaration of Decontrol Policy.—Therefore, it is hereby declared to be the policy of the Congress that the Office of Price Administration, and other agencies of the Government, shall use their price, subsidy, and other powers to promote the earliest practicable balance between production and the demand therefor of commodities under their control, and that the general control of prices and the use of subsidy shall, subject to other specific provisions of this Act, be terminated as rapidly as possible consistent with the policies and purposes set forth in this section and in no event later than June 30, 1947, and on that date the Office of Price Administration shall be abolished.

(e) Agricultural Commodities—(8)(b) The Price Decontrol Board shall proceed forthwith to consider whether the commodities listed in subparagraph (a) shall continue, after August 20, 1946, to be free from regulation under this Act and the Stabilization Act of 1942, as amended. Such Board, after due notice of a public hearing and full opportunity for representatives of affected industries and consumers to present their views orally or in writing, shall have power to determine whether or not any commodity listed in subparagraph (a) shall be regulated after August 20, 1946, under this Act and the Stabilization Act of 1942, as amended. Such Board shall direct that any such commodity shall not be so regulated unless it finds:

> (i) that the price of such commodity has risen unreasonably above a price *equal to the lawful maximum price* in effect on June 30, 1946, *plus the amount per unit of any subsidy* payable with respect thereto as of June 29, 1946.

(C) If in the case of any commodity listed in subparagraph (A) such Board, on or before August 20, 1946, does direct that such commodity shall not be regulated under such Acts, the Board *may at any subsequent time direct* that such commodity shall *be so regulated if it finds*:

> (i) that the price of such commodity has risen unreasonably above a price *equal to the lawful maximum*

price in effect on June 30, 1946, *plus* the amount per unit of any *subsidy* payable with respect thereto as of June 29, 1946.

(D)(10) Whenever maximum prices are in effect for any commodity processed or manufactured in whole or substantial part from any commodity listed in paragraph (8) (A) with respect to which maximum prices are not in effect, *no maximum price*, and no margin, mark-up or discount, *shall be maintained* with respect to such processed or manufactured commodity which does not return to the processors, manufacturers, and *distributors* thereof (A) the *raw material cost* (which must be computed at least once every sixty days at not less that the current cost), (B) the conversion or *distribution cost*, and (C) *a reasonable profit.*

(h) Price Decontrol Board—(3) * * * *Orders of the Board shall not be subject to modification or review by any other department or agency or by any court.*

Sec. 6. (b) When any direct or indirect *subsidy* to an industry is *reduced* or *terminated* or upon recontrol is not restored or is restored only in part, *any maximum price* applicable to the product affected *shall be correspondingly increased.*

Sec. 18 (1) The provisions of this Act shall take affect as of June 30, 1946 * * *.

COMPLAINT AND OPINION BELOW

The complaint is printed in full in the record at p. 1. The opinion of the District Court is printed on p. 44 of the record. The opinion of the Court of Appeals is not yet reported but will be found at p. 50 of the record.

QUESTIONS PRESENTED

1. Whether the Decontrol Board, created by Congress, was authorized to act for and instead of the Office of Price Administration.

2. Whether, when the Decontrol Board, made a finding that the increase in the price of milk, after June 30, 1946, was reasonable, and said increase absorbed only the pre-

vious subsidies as guaranteed by the Act of Congress; said action of the Decontrol Board consequently approved the increase, so that the increase came within the perview of the contract involved herein?

3. Was the escalator clause on its face ambiguous?

4. Whether the course of dealings between the parties to this suit and the provisions of the contract showed their intention that if and when subsidies paid by the Government were discontinued, the contract price would be increased.

STATEMENT

The District Court (Judge Holtzoff) on motions for summary judgment, granted the motion of defendant, holding that the Decontrol Board was not a successor to the Office of Price Administration, stating at the same time, however, that had it been a successor to the O. P. A., plaintiff would be entitled to judgment (R. 45), "Indeed, if the Office of Price Administration had been succeeded by some other agency, or if the powers devolving upon it were transferred to some other agency, the "escalator clause" would apply to any price-fixing action of such other agency. No such situation, however, existed in this case."

The Court of Appeals affirmed (R. 50), and in its opinion stated (R. 54)

> "Assuming, without deciding, that maximum price increases promulgated by agencies in legal effect successors of the O. P. A. could, as a matter of law, be considered "maximum prices as promulgated by the Office of Price Administration" within the terms of the escalator clause, it is clear that neither the Price Decontrol Board nor the Department of Agriculture was in legal effect a successor of the O. P. A. Simpson's contention that these agencies were such successors is unsupported by either reason or authority. Both the Price Decontrol Board and the Department of Agriculture were coexistent with the O. P. A. as reestablished by the Price Control Extension Act. Moreover, the O. P. A. was a price promulgating agency. The

> Price Decontrol Board was not. If it failed to direct that a commodity be not regulated, then maximum prices and regulations and orders under the Emergency Price Control Act as amended were to be applicable; but such prices, regulations and orders were to be those of the O. P. A. not those of the Price Decontrol Board."

The opinions below are disappointing in that they do not give much consideration to the fact that the Emergency Price Control Act of July, 1946, was itself enacted in an emergency. The President of the United States had just vetoed legislation which would have continued the Price Control Act and which included subsidies.

This new legislation, which caused much concern and debate in Congress, had among its principal objectives, guaranteeing industry a reasonable profit. Even if subsidies were to be continued, industry was to be allowed a price that would provide a profit. If subsidies were no longer to be continued, through action of the Decontrol Board, the maximum prices to be set, were to take into consideration the loss of subsidies.

The legislation itself and the debate on the floors of Congress contradict the opinions of the courts below, that the Decontrol Board was not empowered to control prices.

REASONS FOR THE ALLOWANCE OF THE WRIT

I. This is the first case, to counsel's knowledge, to reach this Court, wherein legislation of Congress creating the Decontrol Board, is prayed to be reviewed and interpreted. Because of the War, and the resulting uncertainty of prices, escalator clauses were inserted in many contracts, to protect the seller and the buyer and to induce sellers to enter into contracts, by guaranteeing them a price increase in line with government decontrol.

The Government had paid billions of dollars in subsidies. Prices fell and rose according to the payment of the subsidies. The vetoing of the Price Control legislation by the President, on June 29, 1946, fell like an atom bomb on in-

dustry. Thousands of contracts, containing escalator clauses, were placed in jeopardy, and the decision of this Court in this case, will effect many litigants throughout this country.

If the Decontrol Board was not a price controlling agency, and both lower courts have said it was not; then what does the following language in the Price Control Extension Act of July, 1946 mean:

Sec. e (Agricultural Commodities (D)(9)

> The Price Decontrol Board shall ALSO HAVE POWER TO DETERMINE, when maximum prices are in effect with respect to any commodity listed in paragraph (8)(A) whether ANY SUBSIDY OR ANY PART THEREOF in effect prior to June 30, 1946, SHALL BE REESTABLISHED IN WHOLE OR IN PART; and the powers of the *Administrator*, the Commodity Credit Corporation, and the Reconstruction Finance Corporation to pay subsidies in connection with such commodity shall BE LIMITED IN ACCORDANCE WITH ANY ORDER OF THE BOARD.

The meaning is clear enough when we recall that other sections of the Act guarantee industry a profit. Therefore, if the Decontrol Board should feel that the maximum price guarantees a profit, it need not reestablish subsidies. If the maximum price is too low, then the Decontrol Board can reorder a subsidy that will guarantee a profit.

The discussions on the floors of Congress should assist in determining what Congress meant by this hurriedly passed emergency legislation. The following is taken from the Congressional Record of July 24th, 1946:

P. 9807

Mr. Aiken.—If price ceilings are reestablished for milk in specific marketing areas, does that mean that products derived from milk, produced in the particular area, would also automatically come under control?

Mr. Barkley.—*The Board would have discretion* in that regard, and so would the Administrator. They are not

required automatically to put everything made from milk under control if *they* put milk in any given region under control *and fix ceiling prices.*

Mr. Aiken.—I think the Senator's interpretation is correct, but I wished to make it clear.

Mr. Barkley.—That is my idea about it. The provision with respect to decontrol is subdivision (B) of paragraph (8) on page 4 of the conference report:

• • (1) that the price of such commodity has risen unreasonably above a price equal to the lawful maximum price in effect on June 30, 1946, plus the amount per unit of any subsidy payable with respect there to as of June 29, 1946. • •

P. 9812

Mr. Wiley.—Then it is clear in the mind of the Senator that the livestock producer, the milk producer, the farmer, is covered so that he is more or less *guaranteed his cost?*

Mr. Barkley.—He is put on the same basis and under the same formula as manufacturers and *processors.*

P. 9814

Mr. Barkley.—I may say that the conference report contains provision for payment of the same amount of subsidies—namely, a billion dollars' worth—and it requires that the subsidies shall end by the 1st of next April, just as was required before. The Secretary will have authority to retain the subsidies until April 1. He is not required to do it, but he has authority to do it.

Mr. Barkley.—That applies to the situation after the enactment of this joint resolution. *They* have the right to go back to June 30 and to pay those subsidies in any case in which a milk producer has not increased the price of his milk, under the advice of the Secretary of Agriculture or the request of the Secretary of Agriculture or if for any other reason he has not done so.

Mr. Aiken.—But the Senator from Kentucky does feel, does he not, that in regard to the milk subsidies, at least, the subsidy payments could be retroactive until June 30?

Mr. Barkley.—Yes. I feel sure that the Secretary can have authority to do that, although he is not required to do so.

Mr. La Follette.—Mr. President, with regard to the provisions of subsection (A) and (B) of Section (8) on pages 4 and 5 of the conference report, as the Senator will recall, the Director of Economic Stabilization on April 15 announced a program for increasing the level of the return to dairy farmers in order to offset higher costs. In that statement he repeated the assurance that the returns to the producers would either be by subsidy or by price. He announced, effective during May and June an increase of 20 cents per hundredweight for milk and 5 cents per pound for butterfat over the subsidy rates paid in the same months of last year. If the Senator will recall, the Director of Economic Stabilization then announced there was to be further increases of subsidy rates of 20 cents and of 5 cents, respectively over last year's levels after July 1 and that these subsidies were to be 40 cents per hundredweight for milk. * * My question is this:

Could those commitments which were made by the Office of Economic Stabilization to go into effect on July 1, be taken into consideration, or would the date fixed in the conference report preclude their consideration. In other words, the program had been announced. Of course the OPA law died, and the program did not go into effect. COULD THE BOARD in taking into consideration the subsidies, consider that what had been in effect was really an order which was put into effect 2 days after its date.

Mr. Barkley.—Those were orders which were to become effective on July 1, but because of the lapse of the law did not.

Mr. La Follette.—That is correct.

Mr. Barkley.—I have no doubt that they would be taken into consideration *in determining the reasonableness or unreasonableness of any price* under that subparagraph.

Mr. La Follette.—In other words, any order that was to go into effect, but which was cut off because of the fact that the law expired, could be put into effect, even

though it was to go into effect on July 1 instead of June 29?

Mr. Barkley.—I think undobtedly it could be taken into consideration in regard to the reasonableness or unreasonableness of any price, and also in regard to any moral obligation which might grow out of the fact that there was an order which was to go into effect on a day when it could not take effect.

P. 9818

Mr. Taft.—• • So unless the prices of dairy products go up more than the subsidy plus the granted increase, there could be no claim that prices had risen unreasonably.

P. 9821

Mr. Taft.—• • The subsidy on dairy products runs 2 cents a quart on milk. In a good many places it runs 3 cents a quart on milk. The *increases* in the *prices* of the *milk* and butter and cheese, *which have taken place recently, have been almost equivalent to the subsidy* very little more.

• • Because of the President's action subsidies were taken off all at once and the increases in the price of food which are widely advertised are largely the result of the removal of the subsidies, which were brought about by the President's veto, not gradually, as we contemplated, but all at once. Of course, the increase in the price of food is not a real increase. It simply means that the increase is paid by the citizen as a consumer instead of as a taxpayer.

P. 9863

Mr. Pepper.—We are not giving the O. P. A. authority to put these controls back. The authority goes to a Decontrol Board. We do not know what the personnel of that Board will be. While we have laid down general policies, in the third paragraph of the standards which are set out to govern the Decontrol Board we have allowed AN ABSOLUTELY UNTRAMMELED AUTHORITY IN THE BOARD to determine whether or not it is in the public interest to put the controls back.

July 23, House. P. 9768

Mr. Koppelmann.—Ceilings on other essential commodities are lifted indefinitely. If they are to be put back, it will not be on authority of OPA but on the decision of THE DECONTROL BOARD. OPA may say ceiling should be restored, the Decontrol Board can say no. OPA may recommend a protective ceiling. THE DECONTROL BOARD CAN FIX ANOTHER CEILING.

II. When subsidies were removed from milk June 30, the price of milk increased 2 cents per quart throughout the country. The Decontrol Board, under the power given it by Congress, held hearings, and presented its findings. The OPA presented evidence at these hearings. As to milk, the Board made the following specific finding (R. 40)

> The information received to date, however, seems to evidence restraint and to show that in general prices have been in the neighborhood of the *June 30 ceiling plus the subsidy*. Therefore the Board has failed to find that the price has risen unreasonably *above the June 30 ceiling plus subsidy*.

Rulings of the Board appear in the Federal Register, Vol. 11, page 9138, Aug. 22, 1946, and the Board refers therein to a statement of its determinations. The statement of its determinations did not appear in the Federal Register, but a copy thereof was filed in the lower Court.

It can be clearly seen from the above, that the Decontrol Board approved the increase of 2 cents in the price of milk. If it did not, it would have reordered control and the payment of subsidies.

Petitioner argues therefore, that the Decontrol Board, having so acted, under the power and authority given it by Congress, placed its stamp of approval on the increase. Futher, that respondent became liable to petitioner, for said increase, under the terms of the contract.

This result was contemplated and directed by the creators of the Price Control Extension Act of July 25, 1946, as borne out by their debates hereinabove set forth.

III. It is further submitted that the lower Court erred in stating as a matter of law that the escalator clause involved in the instant case is without ambiguity. The escalator clause states:

> "*Should the maximum prices* as promulgated by the Office of Price Administration, which are in effect on the date of the opening of these bids, *be increased or decreased during the life of the contract, payment will be made* by the District of Columbia at a rate of increase or decrease, *not to exceed* the same ratio that the prices herein quoted bear to the maximum prices authorized by the Office of Price Administration." (Italics supplied)

The lower court construed the above clause as meaning that "if the maximum prices fixed by the Office of Price Administration should be changed *by that agency* then the contract prices should be adjusted accordingly. * * * * * There is no ambiguity in this clause."

However, the clause in short says SHOULD THE MAXIMUM PRICES BE INCREASED OR DECREASED DURING THE LIFE OF THE CONTRACT, PAYMENT WILL BE MADE. This phraseology does not mention the O. P. A. It simply covers increases or decreases in prices which are controlled by the O. P. A. only to the extent that they shall *not exceed* a ceiling promulgated by that agency. There is absolutely no language in the entire contract which requires the milk price to be set by the O. P. A. and the O. P. A. only.

Between July 1st, 1946 and July 26th, 1946, the O. P. A. was non-existent. It is not disputed that an increase in price took place during this period, an increase not arbitrarily made, but an increase which merely offset the subsidy previously paid by the Government. This offsetting of a Government-paid subsidy by an increase in price is exactly what the buyer guaranteed the seller when it incorporated the "escalator clause" in this contract. It is not controverted that the buyer prepared the bid and contract.

As correctly stated by Judge Holtzoff (R. 45) "a contract should be construed as against the party who draws it, in the event of any ambiguity."

The ambiguity of the escalator clause is pronounced when we consider that the lower court decided that an increase would be effective only if the O. P. A. changed maximum prices, whereas the language quoted above from the escalator clause does not even suggest who is to increase or decrease prices.

The District Court (R. 45) stated "Were the Court to extend the "escalator clause" to the situation presented in this case, the Court would be writing a new contract for the parties." In fact, the District Court wrote a new contract for the parties in this case by reading into the escalator clause that a price increase would be effective if promulgated only by the O. P. A.

Another important consideration which the lower courts seemed to overlook in their interpretation of this escalator clause is that even when the O. P. A. acted on maximum prices for milk, any action of the O. P. A. had to be concurrent and with the approval of the Department of Agriculture and the Director of Economic Stabilization.

So, that while the escalator clause only mentioned the O. P. A., in fact three departments of the Government acted concurrently on milk prices, because milk is an agricultural product.

Both parties to this contract were aware of this situation, so that the term O. P. A. always did bring into play a much broader meaning than the designation of a specific governmental agency.

IV. The court below (R. 54) stated "In the absence of ambiguity the intent of the parties to a contract must be ascertained from the language thereof without resort to parol evidence or extrinsic circumstances."

The United States Court of Appeals, Third Circuit, in the case of A. M. Webb & Co., Inc., v. Robert P. Miller Co.,

No. 9739, decided July 27, 1949, reported in 176 F. (2d), No. 4, October 24, 1949, page 681 stated:

> We must follow the principle enunciated in many New York decisions that an interpretation is to be avoided which could make a nullity of a bona fide, arm's-length commercial transaction not contrary to public policy. "If the parties have by any course of dealing made it possible for a reasonable man in their position to understand their intention as to the price, it will be fixed by this understanding, based on previous course of dealing as effectually as if stated in words."

The course of dealings between petitioner and respondent was to protect each on increases and decreases in the price of milk, and they inserted the escalator clause in the contract.

This was made necessary because of uncertainty as to subsidies and the resulting actions of governmental agencies.

In the court below, petitioner set forth in its brief, that in the very next contract between these same parties, the words ANY GOVERNMENTAL AGENCY were inserted in the escalator clause in lieu of "Office of Price Administration." The reason therefor was to clear up the ambiguous clause in this contract by precisely setting forth what the parties intended to state all along, namely, that the milk price be properly adjusted in conformity with future action of the United States Government and the departments thereof controlling prices.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

JOHN F. HILLYARD
Counsel for Petitioner

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The opinions of the United States District Court for the District of Columbia rendered below herein are correctly cited by the petitioner at page 3 of its brief.

QUESTION PRESENTED

The sole question in this case is:

May a clause in a contract calling for adjustments in the delivery price of a commodity based upon fluctuations in the ceiling or maximum prices of that commodity established by the Office of Price Administration be construed to indemnify

the supplier against loss occasioned by the expiration of the Act creating the Office of Price Administration, a removal by the Price Decontrol Board, a subsequently-created entity, of price ceilings upon the commodity, and a resulting increase in price to the supplier caused in part by the existence of a free market in the commodity, in part by an increase in the minimum price to be paid producers pursuant to a Department of Agriculture directive and in part by the withdrawal of subsidies previously paid to producers and distributors of the commodity by the Department of Agriculture?

COUNTER-STATEMENT OF THE CASE

After competitive bidding, the petitioner, as low bidder, by formal contract agreed to supply certain dairy products to the respondent for a period from July 1 to September 30, 1946 upon a cost basis which created a total indebtedness to petitioner in the amount of $21,369.21. This amount was paid to petitioner by respondent. The action below sought to recover an additional amount of $4,485.92. The claim for this additional amount was premised upon a clause in the contract reading as follows:

> "It is the intention of these specifications to obtain competitive proposals from dairies quoting prices for delivery of milk, cream, and buttermilk to institutions, schools, child day care centers, listed herein, in the quantities set forth in the attached schedule for the period beginning July 1, 1946, and ending September 30, 1946.
>
> "Should the maximum prices as promulgated by the Office of Price Administration, which are in effect on the date of the opening of these bids, be increased or decreased during the life of the contract, payment will be made by the District of Columbia at a rate of increase or decrease, not to exceed the same ratio that the prices herein quoted

bear to the maximum prices authorized by the Office of Price Administration."

The Emergency Price Control Act of January 30, 1942, 56 Stat. 23, as amended,[1] creating the Office of Price Administration, expired by its terms on June 30, 1946

The Price Control Extension Act of July 25, 1946, 60 Stat. 664, reestablished authority in the Office of Price Administration to set price ceilings, but further vested authority in the Price Decontrol Board to withdraw suchever commodities as it deemed advisable from the jurisdiction of the Office of Price Administration. This the Price Decontrol Board did with respect to dairy products on August 20, 1946.[2]

Thereafter, during the life of the contract, increases directed by the Department of Agriculture in the minimum price to be paid producers for milk and the withdrawal of subsidies previously paid to producers and distributors of milk by the Department of Agriculture caused the increase in delivery price to the petitioner which it desires to pass on to respondent as a consumer. The parties filed opposing motions for summary judgment in the United States District Court for the District of Columbia, the respondent's motion being granted and the petitioner's motion being denied. (R. 47.) Appeal followed to the United States Court of Appeals for the District of Columbia Circuit and on September 6, 1949 said court affirmed the judgment appealed from. The instant Writ is sought from that judgment.

SUMMARY OF ARGUMENT IN OPPOSITION TO ALLOWANCE OF CERTIORARI AND REASONS FOR DENIAL OF WRIT

1. This case was decided according to applicable existing principles of contract law in effect in the District of Columbia.

[1] Subsequent amendments to the Act are set out in Footnote 2 of the Opinion of Judge Stephens, R. 52.

[2] Decontrol Directive 1, 11 Fed. Reg. 9138 (1946).

Neither the Price Decontrol Board nor the Department of Agriculture was a successor in interests to the Office of Price Administration such as to authorize or compel by implication the substitution of either of these entities for the Office of Price Administration in those portions of the contract relating to price adjustments contingent upon changes in the price ceiling of dairy products authorized by the Office of Price Administrtaion.

The so-called "escalator" clause in issue here was never intended to hold the petitioner harmless from any loss whatsoever. On the contrary it provided only for such price adjustments as might be brought about by the artificial influence of the Office of Price Administration upon the market in milk and was in part designed to insure compliance with law. All other business risks incident to brokerage and distribution under this contract were intended to be borne by the petitioner. Otherwise the competitive bidding and contract award would have been pure amphigory. Had the contract been intended as one providing for the supply of milk on a "cost-plus" basis the language used to convey that intent would have been specific and direct. Petitioner cannot hope to rewrite the contract to reach that result by claiming ambiguity in an unambiguous escalator clause.

2. No facet of the instant case is deemed to bring it within any category of those cases regarded as amenable to certiorari by this Court in Rule 38 (5) of the Rules of this Court and petitioner fails to assert any relationship between the instant case and such categories of cases in its jurisdictional statement.

Petitioner urges that a review of the legislation of Congress creating the Decontrol Board is necessary to reach a disposition in the instant case. (Pet. Br. 5.) Since the true gravamen of this case is the construction of a private contract, the legislation of Congress creating the Decontrol Board certainly need not be reviewed or interpreted, even if its enactment might conceivably have some remote retroactive effect upon the general principles of law governing the interpretation of private contracts.

Petitioner hints at a conflict between the District of Columbia Circuit and the Third Circuit in the principle to be applied in the

construction of unambiguous contracts and in that connection quotes from the case of A. M. Webb & Co., Inc. v. Robert P. Miller Co., 176 F. 2d 679, 681. (Pet. Br. 12, 13.) It is quite evident however, from even a casual reading of the portion of that case quoted in petitioner's brief that the language of the Third Circuit necessarily assumes an ambiguity in the written contract before reference may be made to the prior course of dealing between the parties or to their prior oral expressions of intent.

Also, petitioner infers throughout its brief that this case is the forerunner of a great and important series of cases, the disposition of which is balanced upon a final and comprehensive interpretation of the escalator clause. In fact, however, the theory by which petitioner expects to cumulate a contract calling for a fixed purchase price and an escalator clause contained therein into a contract in practical effect providing for payment of a profit over and above gross costs is so tenuous and imaginative that this case is believed by respondent to stand alone without a companion. Its importance can be measured only in terms of the amount which petitioner lost by entering into a contract which was not hedged against the contingencies and uncertainties of the future.

ARGUMENT

The whole theory and purpose of attempting the formation of executory contracts by the solicitation of competitive bidding is to protect the party purchasing the service or commodity from business risks occasioned by changes in prices of materials, from increases in delivery costs and from all other unstable elements recognized to exist in the business or commerce about to be engaged in.

The low bidder pits his skill and experience, his business judgment in the field of endeavor which the contract concerns, against the unforeseeable contingencies inherent in the contract. The measure of his profit, if any, is directly dependent upon his ability to cope with such contingencies as they arise. Such contracts constitute one of the keystones of the free enterprise economic system.

The contract entered into in the instant case is of that type. The only basis for differentiation which it contains is the escalator clause set forth above which during its tenure permitted changes in maximum ceiling prices made by the Office of Price Administration in the price of milk to be reflected in the price to be paid the petitioner by the respondent for the milk to be delivered pursuant to the contract. There was not one word in the contract or in the specific clause mentioned to justify a conclusion that it was the intent of the parties to establish a new cost basis in the event of the expiration of the Act creating the Office of Price Administration, or to alter the price of milk to be supplied as the costs of delivery might be influenced by directives of the Department of Agriculture, or to have any increase in commodity prices to the supplier absorbed by the consumer or to indemnify the petitioner from loss occasioned by entry into the contract.

In order to create sufficient ambiguity in the escalator clause to raise a question of intent the clause has to be rewritten. It will be noted that counsel for petitioner has obligingly done just this at page 11 of his brief, and having rewritten the clause he argues the ambiguity of his own creation and ignores the intent of the document as it was originally executed between the parties. But since the clause itself as written between the parties was without ambiguity, "The District Court was, therefore, bound to apply it as written rather than according to some asserted interpretation." (Opinion of Chief Judge Stephens, R. 55.)

Failing in the argument that by reason of ambiguity in the contract the court was required to examine the intent of the parties, petitioner urges the view that the Price Decontrol Board and the Department of Agriculture were in legal effect successor entities to the Office of Price Administration and that when full effect is given to the aggregation of their independent actions which brought about an increase in cost to the petitioner, the same amounts in legal

effect to an increase in a maximum ceiling price by the Office of Price Administration. This argument "is unsupported by either reason or authority," according to the United States Court of Appeals for the District of Columbia Circuit. (R. 54.)

In the first place, the Price Decontrol Board had no authority to fix, regulate, or increase prices. Under the Price Control Extension Act of July 25, 1946 that function remained vested in the Office of Price Administration. The Price Decontrol Board was given Congressional authority to determine which commodities might be safely withdrawn from the aegis of price control legislation without adverse effect to the public interest. Thus, when it by its directive relieved the Office of Price Administration of its authority to fix the price of milk, it exhausted the extent of its power. The directive certainly could not then be construed as a proclamation intended to arrogate to the Price Decontrol Board the power no longer existing in the Office of Price Administration to regulate the price of milk. Such price changes as came about obviously resulted from the creation of a free market in the commodity. These changes were, of course, also affected by the decision of the Department of Agriculture to withdraw the subsidies it had been paying to producers and distributors of milk. Its action was in all probability influenced by the removal of ceilings from the price of milk; since with the removal of ceilings a natural market could be established at price levels insuring a fair profit to efficient producers, and at the same time dispensing with the necessity for subsidies. It is therefore fair to say that the action of the Department of Agriculture was a logical development of the action of the Price Decontrol Board, but it is absurd to say that its action was in legal effect the act of the Office of Price Administration or that its action must be construed as an increase in the maximum price ceiling. Likewise its directive of an increase in the minimum price to be paid producers, while ultimately affecting the cost of all producers and all consumers not protected

by a continuing contract, cannot possibly be construed as a declaration of what the *maximum* price should be. Consequently, petitioner's second argument is as tenuous as its first.

Passing for the moment, however, the utter lack of merit in petitioner's case, the issue is not one deserving determination by this Court. Petitioner has failed to assert that the instant case is of such nature and character as this Court has indicated it will consider in Rule 38 (5) of its Rules and the issue is in fact not of such a nature. The law of contracts which the United States Court of Appeals for the District of Columbia Circuit has applied to this case has been long established as a fundamental concept of justice in contract litigation and is well buttressed by the precedent which that court has cited. The case of *A. M. Webb & Co., Inc.* v. *Robert P. Miller Co., supra,* cited by petitioner does not raise or even indicate a conflict of opinion between the local circuit and the Third Circuit. That portion of the opinion in the *Webb* case quoted by petitioner is, when paraphrased, to this effect: If the price is not unequivocally stated in the written agreement, the price agreed upon between the parties may be determined from their prior course of dealing and oral statements. However, in the instant case the price of the commodity was unequivocally stated and the limited circumstances in which the price might be altered were clearly and indisputably delineated.

This case is not one in which this Court must resolve a conflict between Federal Circuits.

Neither is it a case in which an important segment of Congressional legislation must be reviewed and construed in order to reach a disposition. Counsel for petitioner asserts that this case is the first to reach this Court wherein legislation of Congress creating the Decontrol Board is prayed to be reviewed and interpreted. Petitioner raises no question concerning the legality of the creation of the Price Decontrol Board nor does it raise any question concerning an interpretation of the functions of that Board. The

purpose, the scope, the duties and the powers of the Price Decontrol Board have always been clear enough. Petitioner is thus not seeking to have this Court enlarge or construe the jurisdiction of the Price Decontrol Board to encompass this contract, it is seeking to have this Court construe the language of the contract to encompass the action of the Price Decontrol Board. The attack is not upon legislation; it is not upon an action or directive of the Price Decontrol Board. The attack is directed to the construction to be given a clause contained in a private contract. In the absence of a showing that the holding of the court in this case went so far beyond rational concepts of justice as to adversely affect inherent property rights or a showing that the holding abridged or derogated a Constitutional principle it is submitted that the case is not one of sufficient importance to justify review by this Court.

CONCLUSION

It is respectfully submitted that the petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

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